(16)

No. 1331

In the Supreme Court of the United States

OCTOBER TERM, 1944

BRUNO ALBERT FREDERICK HEINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 194–198) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 14, 1945 (R. 198–199). The petition for a writ of certiorari was filed May 29, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a prosecution for making a false statement as to membership in the Nazi Party in an application for a certificate of identification as an enemy alien, it was error to admit evidence that a name similar to petitioner's appeared on a list of party members which had been prepared in the office of the German Consulate.

2. Whether the trial court erred in admitting various exhibits.

3. Whether the fact that, in reading the statute to the jury, the judge included a phrase which had been deleted by an amendment, constituted prejudicial error.

STATUTES INVOLVED

Section 35 (A) of the Criminal Code, as amended (18 U. S. C. 80), provides in pertinent part as follows:

> * * * whoever shall * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

R. S. 4067, as amended by the Act of April 16, 1918, c. 55, 40 Stat. 531, provides in part as follows:

> Whenever there is a declared war between the United States and any foreign

> nation or government * * * and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who became so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted * * * and to establish any other regulations which are found necessary in the premises and for the public safety.

Presidential Proclamation 2537, issued January 14, 1942 (3 C. F. R. Cum. Supp.), provided in part:

> All alien enemies within the continental United States— * * * are hereby required, at such times and places and in such manner as may be fixed by the Attorney General of the United States, to apply for and acquire certificates of identification * * *.

The regulations of the Attorney General issued pursuant to this proclamation on February 24,

1942 (7 F. R. 1477; 28 C. F. R. Cum. Supp. 30.51 ff.) provide in pertinent part:

> 30.51. * * * persons in the United States * * * required to apply for certificates of identification * * * are as follows:
>
> (a) All aliens who are of the age of 14 years or upward and who are German, Italian or Japanese citizens or subjects.
>
> * * * * *
>
> 30.56. (n) The following information shall be furnished by each applicant:
>
> * * * * *
>
> (14) The applicant shall list the clubs, organizations, or societies of which he has been a member or officer, or with which he has been affiliated, at any time during the period of 5 years preceding the date of such application either in the United States or abroad. In the event that any such listed membership or affiliation has ceased prior to the date of the application, the applicant shall give the approximate date thereof. If the applicant spent any part of said 5-year period outside the United States, he shall include a statement of his foreign political party or national organization affiliation during such portion of said 5-year period as he spent outside the United States.

STATEMENT

An indictment in one count was returned against petitioner in the United States District Court

for the Eastern District of New York charging that, in violation of Section 35 (A) of the Criminal Code, he had made a false statement of a material fact in a matter within the jurisdiction of the United States Department of Justice in that, in an application for a certificate of identification required of enemy aliens (see pp. ——, *supra*), he had stated that he had belonged to no clubs, organizations or societies during the five-year period preceding the date of the application, whereas in fact, he had been a member of the Nazi Party during such period (R. 5–7).

The Government proved that on February 11, 1942, petitioner had made the statement in his application as alleged in the indictment (Gov. Ex. 38, R. 81–82, 163–165). The evidence supporting the charge that such statement was false and that petitioner had in fact been a member of the Nazi Party during the five years preceding the application may be summarized as follows:

A stenographer who had been employed in the office of the German consulate in New York, testified that applications for membership in the Nazi Party by Germans residing in the United States and collection of dues from members were regularly handled through the German Consular Office in New York under the supervision of Dr. Draeger, head of the Nazi Party in New York (R. 30–40). Until 1940 there was kept in that office a file of cards listing the names, addresses,

and occupations of members of the Nazi Party in the United States (R. 40–41). In 1940 those records disappeared (R. 40, 42, 59), but prior thereto, a list of the names which had appeared on the file cards was prepared (R. 42–44). At the direction of one Vogel, secretary to Draeger (R. 28–29), the list was called, "List of names of persons who have applied for passports" (R. 54, 58–59; Gov. Ex. 24, R. 190). Petitioner's name appeared on this list (R. 190). He had never applied for a passport (R. 95–96). His name also appeared on a partially burned list of members whose dues were in arrears, with a notation indicating that his dues had subsequently been paid up to February 1940 (R. 45–47, Gov. Ex. 25, R. 190).

In September 1939 petitioner was dismissed by the Hamburg-American North German Lloyd Co. for which he had worked in Germany and after his arrival in the United States in 1937 (R. 11–13, 84–85). In a letter which petitioner wrote on September 15, 1939, to a director of that company in Germany complaining of his discharge, he stated that he had turned to the German Consul General and to the party office for help, but that they could not assist him (Gov. Ex. 29, R. 151–152). On October 9, 1939, petitioner wrote a letter to the director of the company in New York, a copy of which he stated he was sending to Dr. Draeger (Gov. Ex. 30, R. 153–156); in

this letter he again complained of his discharge and said that "As a party member I am not permitted to become an American citizen" (R. 155). Shortly thereafter, he was employed by Fortra, Inc., an organization through which packages of food were sent to people in Germany (R. 13). Until confronted with the letters during the investigation of the case, petitioner denied that he had ever written to anyone that he was a member of the Nazi Party (R. 65).

After petitioner had obtained his position with Fortra, he told an employee of the Hamburg-American Line that the head of the line in New York "thinks I have been forced upon him, that I came over against his will because I was a member of the Nazi Party in Germany and he thinks he had to take me in" (R. 73–74).

When F. B. I. agents searched petitioner's home (see pp. ——, *infra*) they found a number books bearing swastikas and containing pictures of Hitler, pins representing contributions to the German Winter Relief Fund, and a pin indicating attendance at a Nazi Party convention at Nuremberg (Gov. Exs. 1–8, R. 14–21, 185–186, 122–123).

Petitioner was convicted (R. 149) and was sentenced to imprisonment for 18 months (R. 168–169). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed (R. 198–199).

ARGUMENT

1. Petitioner contends (Pet. 8, 12, 27–28) that since there was no proof identifying him as the person whose name appeared on the lists of party members prepared in the office of the German Consulate (see *supra*, p. —), it was error to admit such lists in evidence against him. However, the appearance of a name similar to petitioner's on the lists clearly tended to corroborate his own statements that he was a member of the Nazi Party and thus was a circumstance which the jury was entitled to consider. Cf. *Brink* v. *United States*, 60 F. 2d 231, 234 (C. C. A. 6), certiorari denied, 287 U. S. 667. As the court below held (R. 195), all the evidence together constitutes "persuasive" proof of petitioner's guilt.

2. There is no merit in petitioner's objections to the admission of various exhibits (Pet. 7, 12, 20–27).

(a) The evidence of German publications and various Nazi insignia found in petitioner's home (see Pet. 20–21) was directly relevant to the charge in the indictment that he had concealed his membership in the Nazi Party. Petitioner had told investigating officials that he was not a member of the Nazi Party, that he was not in sympathy with the Nazis, and, when confronted with his letters to the directors of the Hamburg-American Line, had said that his statements that he was a member were fabrications designed to

secure his reinstatement in his former position (R. 13, 64–65). It was therefore proper for the Government to introduce evidence tending to show that petitioner was more sympathetic to the Nazi Party than he claimed to be. Cf. *United States* v. *Cramer,* 137 F. 2d 888, 897 (C. C. A. 2), reversed on other grounds April 23, 1945, No. 13, this Term; *United States* v. *Pelley,* 132 F. 2d 170, 181 (C. C. A. 7), certiorari denied, 318 U. S. 764.

(b) As set forth in the Statement, *supra,* a former stenographer employed in the German Consulate identified the lists on which petitioner's name appeared as lists of Nazi Party members. In the course of her testimony as to the manner in which party affairs were handled in the consular office, the Government introduced samples of the forms of application, membership cards, dues, receipts, etc. (Gov. Exs. 10–23, 26–27, R. 30–39, 48, 57, 186–189, 190–191). Petitioner contends that these exhibits were irrelevant and prejudicial (Pet. 21–25). However, the exhibits were properly admitted as tending to establish the authenticity of the witness's testimony that the lists were in fact known to her to be lists of Nazi Party members. The trial judge was careful to limit the purpose for which these general exhibits were received in evidence by charging the jury that they "were admitted only for completeness. They do not tend—and I cannot make this too clear—do not tend to show—there is no

entry on any one of them containing the name of this defendant" (R. 142–143). The judge advised the jury not to look at the exhibits, but stated that they would have the right to consider them as material used in the compilation of the lists (R. 143).

(c) Petitioner contends (Pet. 25–27) that other exhibits (Gov. Exs. 2, 30–35, R. 16, 66–68, 185, 192) were unlawfully taken from his home. These were obtained in November 1942 by an F. B. I. agent at a time when only petitioner's wife was at home (R. 61).[1] His wife testified that she resented the search but stated that "I just let him go ahead and search the home" (R. 135) and that "I am very sure that Mr. Fitzgerald knows that I was very cooperate (*sic*) in the search" (R. 136). It is thus evident, as the circuit court of appeals held (R. 197), that the wife did not withhold her consent to the search. In any event, petitioner made no motion to suppress this evidence before trial and, although he objected to the admission of other exhibits, he did not seek to have these exhibits excluded (R. 82). Petitioner is, therefore, not now in a position to contest the validity of the means by which these exhibits were obtained. *Nardone* v. *United States,* 308 U. S. 338, 341–342; *Seguerola* v. *United States,* 275 U. S. 106, 111; *United States* v. *Wernecke,*

[1]A previous search had been madei n January 1942 with petitioner's consent (R. 10).

138 F. 2d 561, 564 (C. C. A. 7), certiorari denied, 321 U. S. 771; *Peters* v. *United States,* 97 F. 2d 500, 502 (C. C. A. 9).

3. At the outset of his charge, the trial judge read to the jury the governing statute (Section 35 (A) of the Criminal Code), included the phrase, "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States or any Department thereof," which had been deleted by the amendment of June 18, 1934, c. 587, 48 Stat. 996 (R. 138). Petitioner contends (Pet. 8–9, 12, 13–18) that the inclusion of this phrase enabled the jury to base its verdict upon an offense not charged in the indictment. However, immediately following the reading of the statute, the judge instructed the jury: "The charge contained in the indictment is that this defendant falsely and with knowledge of its falsity misrepresented to the United States something that the United States was entitled to know, namely, that he was a member of the Nazi Party. That is the charge." Subsequently, the judge charged the jury in substance that the only contested issue in the case was whether petitioner had been a member of the Nazi Party within the five-year period preceding his application for a certificate of identification (R. 142). Manifestly, therefore, the error in the reading of the statute could not have misled the jury and does not constitute reversible error (cf. *Douchan* v. *United States,* 136 F. 2d 144, 147–

148 (C. C. A. 6), certiorari denied, 319 U. S. 773; *Clark* v. *United States,* 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789); particularly since counsel for petitioner failed to call the judge's attention to the error and took no exception to the charge in this respect. *Johnson* v. *United States,* 318 U. S. 189, 201; *United States* v. *Manton,* 107 F. 2d 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664. As the court below pointed out (R. 196), moreover, the error, if it had any influence at all, operated favorably to the petitioner.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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